

March 16, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITElisabeth A. Shumaker
Clerk of Court

In re:

GLEN BURTON AKE,

Movant.

No. 09-7015

ORDER

Before **BRISCOE**, **MURPHY**, and **HARTZ**, Circuit Judges.

Glen Burton Ake seeks authorization to file a second or successive 28 U.S.C. § 2254 habeas petition. Because he has not made the requisite showing under 28 U.S.C. § 2244(b)(2), we deny his request.

Mr. Ake was convicted after a jury trial in Oklahoma of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill. His conviction became final in October 1989. In October 2002, Mr. Ake filed his first § 2254 habeas petition, which the district court dismissed as time-barred. This court denied his request for a certificate of appealability. He now seeks leave to file a second or successive habeas petition, arguing that he has newly discovered evidence to support his new claim for relief.

Mr. Ake's request for authorization to file a second or successive § 2254 petition may be granted if his new claim relies on a "factual predicate . . . [that]

could not have been discovered previously through the exercise of due diligence;” 28 U.S.C. § 2244(b)(2)(B)(i), and “the facts underlying the claim, if proven . . . would be sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found [him] guilty of the underlying offense[s],” *id.* § 2244(b)(2)(B)(ii). Mr. Ake seeks leave to present one new claim: that the trial judge violated Article 4, Section 1 of the United States Constitution (the Full Faith and Credit Clause) when he refused to follow state law and order the impaneling of a separate jury to determine the question of Mr. Ake’s sanity pursuant to Okla. Stat. tit. 22 § 1162.

Mr. Ake argues that he just recently became aware of the existence of Article 4, Section 1 when he was preparing to file a 42 U.S.C. § 1983 action. This claim, however, does not meet the requirements of § 2244(b)(2). Mr. Ake presents no newly discovered evidence; he simply presents a new legal theory. The recognition of a potential legal issue is not evidence. And, thus, the belated recognition of a potential legal issue does not constitute newly discovered evidence. Moreover, Mr. Ake has not demonstrated that this new “evidence” would establish that he was not guilty of the charged offenses.

Because Mr. Ake has failed to satisfy the requisite conditions in 28 U.S.C. § 2244(b)(2), authorization to file a second or successive § 2254 petition is

DENIED. This denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in black ink, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk